No. ~~15398~~ 15308

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MARGUERITE MAY DONALDSON AND ELMIRA DONALDSON LUCKER, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on March 27, 1956 by the District Court for the Western District of Washington (R. 35, 36) granting judgment to the appellees for the proceeds of a $10,000 National Service Life Insurance Policy on the life of Allen Perry Donaldson. The District Court's jurisdiction was based upon 38 U.S.C. 445, 817. The United States filed notice of appeal on July 5, 1956 (R. 51) and time for docketing the appeal was extended by order of the District Court to October 3, 1956 (R. 51). The case was docketed in

this Court on September 29, 1956 (R. 92). This Court's jurisdiction rests upon 28 U.S.C. 1291 and 38 U.S.C. 445.

STATEMENT OF FACTS

This action was brought in the United States District Court for the Western District of Washington to recover the proceeds of a National Service Life Insurance Policy issued to Allen Perry Donaldson.

The facts are not disputed. Donaldson was issued an NSLI policy in the amount of $10,000, on which his mother was designated as principal beneficiary and his father as contingent beneficiary, in naval service during World War II (R. 24, 25). Donaldson was found to be suffering from Hodgkins Disease after examination at the naval hospital at Oakland, California in September 1943 (R. 25). In July 1944, Donaldson was transferred to the naval hospital at Seattle, Washington, where his diagnosis was changed from Hodgkins Disease to Lymphadenitis Cervical, a curable condition (R. 25). Donaldson was released from the Seattle hospital in August 1944, and returned to active duty as physically fit (R. 25). When he was discharged from naval service in October 1945, he was found to be physically fit, except for "defective vision—caries teeth" (R. 25, 26, 32). Donaldson's NSLI insurance policy lapsed for nonpayment of premiums in December 1945 shortly after his discharge (R. 26). He worked at various jobs from the time of his discharge until September 1948, when he developed a lump under his arm. He was examined immediately by Veterans Administration physicians and diagnosed as suffering from Hodgkins Disease (R. 32). For over three years following this diagnosis, Donaldson received out-patient treat-

ment at regular intervals at the Veterans Administration Seattle hospital (R. 32). He was again hospitalized in March 1952, and died on March 24, 1952 from Hodgkins Disease (R. 32). After Donaldson's death, his mother, the principal beneficiary of his insurance, applied for benefits under the policy (R. 30, 31). When her claim was denied by the Administrator, she brought this suit to recover the policy proceeds, contending that Donaldson had been totally disabled at all times between 1945 and 1952, and that his failure to apply for waiver of premiums on his policy was due to circumstances beyond his control (R. 3-6). The case was tried to the district court in January 1956.

On the day of the trial, Donaldson's widow filed a motion to intervene, and a complaint in intervention, contending that Donaldson had designated her as beneficiary on his policy and that she was entitled to the proceeds (R. 9-22). The District Court, on February 6, 1956, after finding that Donaldson had been totally disabled from the time his policy lapsed, and had been prevented by circumstances beyond his control from applying for a premium waiver, denied the motion to intervene and indicated that it would give judgment for the plaintiff for the policy proceeds. Subsequently, on February 27, 1956, with the concurrence of Government counsel, the district court vacated its prior order and granted the motion to intervene (R. 50). On March 13, 1956, counsel for the plaintiff and for Donaldson's wife advised the court of an agreement that plaintiff would assign 50 per cent of her interest in the insurance proceeds to the intervenor wife, as trustee for Donaldson's minor children (R. 32, 33, 35, 36, 51). The district court dismissed the complaint in intervention on March 19, 1956, and entered judgment on March 27, 1956 awarding

one-half of the policy proceeds to plaintiff and the remaining half to the wife, pursuant to a stipulation filed with the district court (R. 23-36). A timely motion by Government counsel to reopen the case on the basis of newly discovered evidence contained in an affidavit filed by the wife in support of her motion to intervene and for a new trial was denied on May 7, 1956 (R. 47). This appeal followed.

SPECIFICATION OF ERRORS TO BE URGED ON APPEAL

1. The District Court erred in holding that the insured veteran Donaldson was prevented from applying for waiver of premiums on his lapsed NSLI policy by circumstances beyond his control, at a time when he knew that he was totally disabled.

2. The District Court erred in awarding appellee Donaldson's counsel twenty per cent of the judgment entered on her behalf, rather than the ten per cent maximum allowed by statute.

3. The District Court erred in denying appellant's motions to reopen the hearing on the basis of newly-discovered evidence and for a new trial.

SUMMARY OF ARGUMENT

I

A. The National Service Life Insurance Act (38 U.S.C. 802(n)) permits waiver of past due premiums on NSLI policies on application by the insured within one year of the latest date on which waiver is sought. The insured's failure to apply within the time limit is excused if "due to circumstances beyond his control". This Court held in *Kershner* v. *United States* that an insured veteran who is ignorant of the nature or seriousness of a condition entitling him to waiver of premiums on a lapsed National Service Life Insurance

Policy is thereby prevented from applying for a waiver of premiums by "circumstances beyond his control" within the meaning of 38 U.S.C. 802(n). The evidence and the district court's findings in this case permit no doubt that Donaldson, the insured veteran here, knew for three years prior to his death that he was then totally disabled and had been suffering from an incurable disease since his policy lapsed. Since despite this knowledge Donaldson failed to apply for a premium waiver, under the *Kershner* decision there can be no doubt that his beneficiary was not entitled to a retroactive waiver of premiums.

B. The fact that Donaldson may have been uncertain, when he discovered his total disability in 1948, whether he had in fact been totally disabled at all times since his policy lapsed in 1945, and hence in doubt as to whether he was entitled to a retroactive waiver, did not relieve him of the statutory requirement of applying for a waiver of premiums to have his eligibility determined. Nor can his presumed uncertainty be considered a "circumstance" preventing him from applying for a waiver. Any other view would have the practical effect of eliminating the requirement, imposed by Congress, that a waiver be applied for within one year of the policy lapse.

C. Finally, assuming that Donaldson was uncertain or misinformed as to his legal rights, such uncertainty was clearly not a circumstance beyond his control preventing him from filing an application to determine and preserve his rights.

II

The District Court awarded 20% of the judgment received by the appellee, Marguerite Allen Donaldson, to Counsel for appellee Donaldson, instead of the 10%

maximum authorized by 38 U.S.C. 551, 817. It is well settled that no more than the statutory maximum can be allowed.

ARGUMENT

I

No "Circumstances Beyond His Control" Within the Meaning of 38 U.S.C. 802(n) Prevented Donaldson From Applying for Waiver of Premiums on His National Service Life Insurance Policy.

A. Under This Court's Decisions, Donaldson Was Not Prevented From Applying for a Waiver of Premiums by "Circumstances Beyond His Control".

Section 602(n) of the National Service Life Insurance Act (38 U.S.C. 802(n), *infra*, p. 21) states that premiums on National Service Life Insurance policies may be waived during total disability of the insured, provided the insured files an application for the waiver within one year of the earliest date on which waiver is sought.[1] The third proviso of Section 802(n) states that the application requirement may be relaxed by the

[1] A similar requirement that the application must be made within a limited time is common in commercial insurance policies providing disability waivers. Many such policies require an application while the policy is still in force under premium-paying conditions. See Appelman, *Insurance Law and Practice*, Sec. 8309-10 (1944 ed.); Couch, *Cyclopedia of Insurance*, Sec. 609 (1929). Some commercial policies permit notice and proof of loss (*i.e.*, application for waiver of premiums) as late as thirty or sixty days after the date of an unpaid premium. Uniformly, these limitation provisions are accorded binding effect by the courts. See *e.g.*, *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489; *Columbian Nat. Life Ins. Co.* v. *Goldberg*, 138 F. 2d 192, 196 (C.A. 6), certiorari denied, 321 U.S. 765; *Patterson* v. *National Life & Accident Ins. Co.*, 183 F. 2d 745 (C.A. 6); *Nalley* v. *New York Life Ins. Co.*, 138 F. 2d 318 (C.A. 5); *Egan* v. *New York Life Ins. Co.*, 67 F. 2d 899 (C.A. 5); *Equitable Life Assur. Soc. of U.S.* v. *Mercantile Commerce Bk & Trust Co.*, 143 F. 2d 397, 399-400 (C.A. 8); *Magill* v. *Travelers Ins. Co.*, 133 F. 2d 709, 712 (C.A. 8), certiorari denied, 319 U.S. 773; *Rintoul* v. *Sun Life Ass'n Co.*, 142 F. 2d 776 (C.A. 7), certiorari denied, 323 U.S. 776; *Griffiths* v. *Massachusetts Mut. Life Ins. Co.*, 96 F. 2d 57 (C.A. 2).

Administrator for any period during which the insured's failure to apply for a waiver is found to be "due to circumstances beyond his control." The third proviso was added in 1942 during World War II at the request of the Veterans Administration, which drafted its language, in order to protect the insurance of servicemen who had become physically isolated such as war captives, and insane or mentally incompetent persons, all of whom are denied the opportunity to apply for a waiver by "circumstances" beyond their "control". This was the view of the proviso taken by the Veterans Administration at the time it was drafted and presented to Congress, and has been the Administration's consistent view since that date. S. Rep. No. 1430, 77th Cong., 2d Sess.; H. Rep. No. 2312, 77th Cong., 2d Sess.; S. Rep. No. 1105, 78th Cong., 2d Sess; see also *Aylor* v. *United States,* 194 F. 2d 968 (C.A. 5); *Scott* v. *United States,* 189 F. 2d 863 (C.A. 5), certiorari denied, 342 U.S. 878; *United States* v. *Cooper,* 200 F. 2d 954 (C.A. 6); *Gossage* v. *United States,* 229 F. 2d 166 (C.A. 6).

This Court, however, in *Kershner* v. *United States,* 215 F. 2d 737 (C.A. 9) following *Landsman* v. *United States,* 205 F. 2d 18 (C.A.D.C.), certiorari denied, 346 U.S. 876. has extended the scope of the proviso to cover a veteran who was ignorant of the existence or extent of his disability and was thereby "deprived of a chance, disability existing, to make a free or intelligent choice of whether or not he wanted his insurance to continue." (215 F. 2d at 739).

The *Landsman* proceeding in the District of Columbia Circuit concerned a veteran who developed Hodgkins Disease in military service and allowed part of his NSLI policy to lapse on his discharge. When, two years later, the veteran died of Hodgkins Disease, his beneficiary brought suit for the lapsed policy proceeds, her

complaint alleging, *inter alia,* that it would have been impossible for the veteran to have discovered his eligibility for a waiver, since both he and his physicians were ignorant of his true condition until he was "on his death bed" and that she was therefore entitled to a retroactive waiver. The Government moved for summary judgment without controverting these allegations. The district court gave judgment for the Government, apparently concluding that the third proviso of Section 802(n) was limited to mental incompetence, and therefore did not apply to total ignorance of a disease. On the issue thus framed, the District of Columbia Circuit reversed, holding (*id.* at 22) that "ignorance of the existence or seriousness of an injury or disease may in a proper case constitute such a circumstance [beyond the veteran's control]—*if the ignorance is in fact beyond control.*" (Emphasis supplied).

In *Kershner, supra,* this Court, following *Landsman,* held that a totally and permanently disabled veteran whose physicians for medical reasons "chose to encourage him to believe there was real hope for an eventual recovery" was unaware of the seriousness of his true condition, which this Court held was a circumstance beyond his control preventing him from applying for a waiver. Since the veteran had been misled by his physicians as to his true physical condition, the Court found that his ignorance was in fact beyond his control (215 F. 2d at 739).

Here, unlike *Kershner* and *Landsman,* appellee did not contend [2] and the district court did not find that

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[2] The complaint stated (R. 5):

That due to the nature of the disease, it was impossible for Allen Perry Donaldson to know his condition, especially in view of the errors in diagnosis, until some time after 1948.

Donaldson was ignorant of his true condition at all times prior to his death, including the period following September 1948 when he was rediagnosed as suffering from Hodgkins Disease. Rather, the court found that "it was impossible for Allen Perry Donaldson to know his condition *until some time after 1948*" (F. VIII; R. 28). The district court's findings recognized that, although Donaldson might have been ignorant of his disease prior to 1948, he was aware of his condition during the three-year period following rediagnosis and preceding his death.[3] In contrast to *Kershner,* the decision below was not based on a finding that Donaldson was ignorant of his disability at all times prior to his death, but rested on an entirely different basis: Donaldson's assumed uncertainty as to whether he was totally disabled in 1945. This basis for the decision is considered in part IB, *infra,* pp. 11-14.

Unlike the veteran in *Kershner,* therefore, while Donaldson might have been ignorant of his true condition during 1945-1948 because his disease was in recession during that period (R. 59-64), it is clear that he was capable of making an "intelligent choice of whether or not he wanted his insurance to continue" during the following three years when he recognized the seriousness of his condition (*Kershner, supra,* at 739).[4]

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[3] This conclusion, which is implicit throughout the district court's findings, is supported by undisputed evidence that Donaldson knew that he had Hodgkins Disease, and that he was aware of the seriousness of this condition. (R. 53, 55, 56, 71-74, 75). In this connection, it is significant that Donaldson immediately applied for and received compensation for 100% disability on learning of his diagnosis. (R. 70, 75).

[4] Donaldson was mentally competent at all times prior to his hospitalization immediately prior to his death (R. 58).

This Court was at pains to point out in *Kershner* (*id.* at 740) that

> Had the veteran fully known of his condition and its almost certain ending within a short time, and he being competent mentally, as Kershner was, then this Court should hold against him.

The record below and the district court's findings establish that for three years Donaldson knew that he had Hodgkins Disease, and recognized the seriousness of this disease. Since he did not apply for waiver of premiums within one year of the time he discovered his true condition, he was not entitled to a waiver at the time of his death. His beneficiary stands in no more favorable a position, *Kershner* v. *United States, supra,* at 739, and cases there cited.

This conclusion accords with the Sixth Circuit's holding in *Gossage* v. *United States,* 229 F. 2d 166, 170 (C.A. 6) denying recovery on a lapsed policy on the life of a totally disabled veteran who failed to apply for waiver of premiums despite knowledge of his disability, stating:

> Appellant has not argued that even though Garner [the insured] knew of his illness in September or October, 1947, he did not know of it prior to August 1, 1947. In any event, while the exact date that Garner learned of his condition was not known, he had a duty to act [*i.e.,* apply for premium waiver] within a reasonable time after October, 1947, when he concededly knew of his condition, and he failed to do so.

B. Donaldson Was Not Prevented From Applying for a Waiver of Premiums on His Insurance Policy by His Alleged Uncertainty Whether He Was Disabled at the Time His Policy Lapsed.

1. Thus far we have sought to show that under this Court's decisions the district court's findings provide no basis for its ultimate conclusion that Donaldson, from the time his policy lapsed up to his death, was prevented from applying for a premium waiver by circumstances beyond his control. The district court's comments at the conclusion of the trial (R. 75-82), however, suggest a further ground for its conclusion that appellees were entitled to a waiver. Although the court recognized that Donaldson knew his true condition after September 1948, it reasoned that a possible uncertainty on the part of the veteran in 1949-1952 as to whether or not he had been totally disabled, not during those years but when his policy lapsed in 1945, was *a circumstance beyond his control preventing him from applying for waiver between 1949 and 1952* (R. 79-80).

This conclusion flies squarely in the face of common sense and the statutory requirement. It is of course possible that Donaldson, after he became aware of his true condition in 1949, could not be absolutely certain whether he had been totally disabled in 1945-47, and hence might have been uncertain whether he was eligible for waiver under this Court's decisions, in view of the fact that he did not apply within a year of his policy's lapse. If this was the case, his obvious remedy was to apply for waiver as provided in Section 802 (n), and have that issue determined. Waiver applicants must frequently be in some doubt as to whether they are in fact eligible for a waiver, but a doubt of this kind clearly does not relieve them of the obligation to

make the application, which is a statutory preliminary to allowance of a waiver. It is sufficient here that Donaldson knew there was a good chance he *might* be entitled to waiver of premiums by virtue of total disability and hence that it was in his interest to file an application in order to determine that fact. His assumed uncertainty,[5] not as to his present disability but with regard to his health at the time his policy lapsed, similarly could not have been a "circumstance beyond his control" preventing him from applying for a disability waiver to resolve the question. See *Gossage* v. *United States, supra,* p. 10.

2. The District Court at the conclusion of its oral decision (R. 82) although purporting to rely on both the "spirit and the letter" of *Kershner,* recognized that the theory which it adopted constituted a departure from that holding, stating that "I recognize that the Court in this case has probably gone further than any other court in which a decision has been reported * * *." The reasoning adopted by the District Court, practically speaking, abrogates the requirement that applications for waiver of premiums be made within one year of the earliest date waiver is sought (in this case, the date of the policy lapse). The obvious purpose of Congress in requiring an application to the Administration within a year's time was to permit determination of total disability while evidence as to the veteran's health was still available to the Administration. While this Court has extended the exception, we submit incorrectly, to cover not only the incompetent or insane soldier and the war captive or the ship-

[5] No evidence was introduced as to Donaldson's state of mind in 1949-1952 with regard to his health condition in 1945-1947.

wrecked sailor (*cf. Kershner, supra,* at 739), but also insured veterans who are ignorant of the nature or seriousness of their total disability, "if the ignorance in fact is beyond control" *Landsman* v. *United States,* 205 F. 2d 18, 22 (C.A.D.C.); *Kershner, supra* at 740, the district court's theory eliminates entirely the requirement that the circumstances be beyond the veteran's "control" in any real sense, thereby reading the application requirement out of the statute.

As we have pointed out, most beneficiaries could claim with some plausibility that their insured could not have been certain he was totally disabled when his policy lapsed. A very large number of NSLI policies lapsed in 1945-1946 when, as here, the policy holders were discharged from service and their premiums were no longer withheld from their pay. If years later after their deaths, beneficiaries could rely on the veterans' uncertainty as to the existence and extent of their disability at the time of discharge—thus excusing a failure to apply for a waiver even after the veteran became fully aware of a pre-existing disability—it would be futile as a practical matter for the Government to try to show that a veteran knew he was disabled at the time he allowed his policy to lapse.

The district court's theory therefore is doubly objectionable: first, because it would allow a beneficiary to obtain waiver of premiums despite the fact that the veteran, as here, unquestionably knew of his total disability and failed to act; and second, because it would extinguish in many cases the statutory requirement for a timely waiver application by expanding a narrowly drawn exception in order to permit recovery by beneficiaries of veterans who were not prevented from

applying for a waiver by any factor over which it could be said they had no control.[6]

C. Donaldson Was Not Prevented by His Alleged Ignorance of His Legal Rights From Applying for a Waiver of Premiums.

1. Certain evidence introduced at the hearing below might be interpreted as showing that Donaldson not only was aware of his permanent total disability but that he contemplated filing an application for a waiver of premium, but did not do so after apparently concluding that his rights on the policy had expired. When Donaldson learned that he was totally disabled in September 1948, he designated the Veterans' of Foreign Wars as his legal representative before the Veterans Administration. The VFW assisted him in applying for disability compensation and (according to Donaldson's father and an affidavit filed by Donaldson's wife as intervenor (R. 10, 11, 65-74)), apparently advised him that he could not obtain waiver of premium on his insurance but that suit could be brought after his death to establish his rights. Donaldson's father also testified that sometime in 1948 he had accompanied his son to a Veterans Administration branch office in Seattle to inquire about his insurance after Donaldson learned of his total disability, and was told by an unidentified VA employee that Donaldson had no rights under the

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[6] The Government continues to adhere to its view that the third proviso to 802 (n) was not intended to apply to ignorance or other states of mind, but rather to any physical disability, restraint or mental incapacity actually preventing the veteran from making application; and the Court is urged to reconsider its decision in *Kershner* in the light of the arguments presented here, as well as in that case. Accepting *Kershner* as the law of this Circuit, however, we submit for the reasons presented here that the district court's decision was wrongly decided.

policy inasmuch as it had lapsed for non-payment of premiums in 1945 (R. 65-74). The district court did not refer to and made no findings with respect to this evidence, which, of course, if accepted, leaves no doubt that Donaldson knew his condition and that he could file an application for waiver of premiums.

Appellee may argue, on the assumption that the foregoing evidence must be accepted at face value, that Donaldson was misled by the VFW or by a VA employee as to his legal rights under the statute, and that this was a circumstance beyond his control which prevented him from filing for a waiver of premium.

It is clear, assuming what has by no means been established, that he was misled, that Donaldson was not relieved of the obligation to file an application for waiver of premiums merely because of a mistaken belief that right to waiver could be established after his death. Under well established principles, a mistake as to the law, even though induced by another, did not relieve Donaldson of the statutory requirement of preserving his legal rights by filing a timely application, thereby giving the VA an opportunity to determine his entitlement to waiver while he was still living.[7] *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 384-385. Moreover, assuming that weight can be assigned to the nebulous testimony of Donaldson's father regarding visit

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[7] The Government accepts, for the purposes of this appeal, the district court's finding that Donaldson was totally disabled between 1945 and 1948. In the district court, the Government contended that Donaldson's disease, which had been in recession during this time, had not prevented him from working over a three year period without injury to his health, and that he was not therefore totally disabled in an insurance sense during the period. See *United States* v. *Deal*, 82 F. 2d 929 (C.A. 9); *Corrigan* v. *United States*, 82 F. 2d 106 (C.A. 9).

to the VA branch office, it is well established that misinformation supplied to an insured person by a government employee does not have the effect of estopping the Government from denying liability on an insurance contract. *Federal Crop Insurance Corp.* v. *Merrill, supra; Scott* v. *United States,* 189 F. 2d 863 (C.A. 5), certiorari denied, 342 U.S. 878; *McIndoe* v. *United States,* 194 F. 2d 602 (C.A. 9); *United States* v. *Stewart,* 311 U.S. 60.

The alleged advice given Donaldson also cannot be said to have been a circumstance beyond his control which prevented him from filing an application. Ignorance or uncertainty as to the law is not ignorance of the extent or existence of total disability, the factor found to be a circumstance beyond the veteran's control in *Kershner, supra; United States* v. *Myers,* 213 F. 2d 223 (C.A. 8) and *United States* v. *Vandver,* 232 F. 2d 398 (C.A. 6). See *Scott* v. *United States,* 189 F. 2d 863, certiorari denied, 342 U.S. 878; *Landsman, supra,* 205 F. 2d at 22, *fn.* 12. Donaldson was of course presumed to know the terms of his contract and the law, *Federal Crop Insurance Corp.* v. *Merrill, supra,* and advice concerning legal rights, if in fact advice was given, was not a circumstance beyond the veteran's control preventing him from applying for a waiver, even in the sense that a veteran is said to be prevented from applying by ignorance of his disability—the sole basis for waiver eligibility. If, as the district court found, Donaldson knew that he was totally and permanently disabled "sometime" after September 1948, he was not prevented from making a waiver application by uncertainty as to his legal rights (and the evidence at most reveals uncertainty, not total ignorance). Furthermore, such uncertainty, assuming its existence, was not beyond the veteran's control, for it could be resolved readily by the very action that Donaldson failed

to take—an application for waiver of premiums. As the District of Columbia Circuit points out in *Landsmen* (205 F. 2d at 22) a veteran's "ignorance"—may constitute such a circumstance—"if the ignorance is in fact beyond control."

The Veterans Administration, and the Insurance Fund which it administers, (38 U.S.C. 805), are unquestionably entitled to the protection provided by Congress in requiring that waivers be sought within a year after the veteran first becomes aware that he might be totally disabled, and therefore able to revive his lapsed policy. A veteran's ignorance or uncertainty as to his contract rights cannot nullify this Congressional requirement in the light of long established principles to the contrary, which have the sanction both of common sense and authority. *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 384-385,[8] *McIndoe* v. *United States,* 194 F. 2d 602 (C.A. 9).

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[8] "If the Federal Crop Insurance Act had by explicit language prohibited the insurance of spring wheat which is reseeded on winter wheat acreage, the ignorance of such a restriction, either by the respondents or the Corporation's agent, would be immaterial and recovery could not be had against the Corporation for loss of such reseeded wheat. * * * Accordingly, the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance. The oft-quoted observation in *Rock Island, Arkansas & Louisiana Railroad Co.* v. *United States,* 254 U. S. 141, 143, that "Men must turn square corners when they deal with the Government," does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury. The "terms and conditions" defined by the Corporation, under authority of Congress, for creating liability on the part of the Government preclude recovery for the loss of the reseeded wheat no matter with what good reason the respondents thought they had obtained insurance from the Government. (332 U.S. at 384, 385)."

It is not without significance, moreover, that the district court failed to find that Donaldson was misled into believing that his rights could be established only by suit after his death. At face value, the testimony of Donaldson's father amounts merely to an assertion that Donaldson was told by a minor VA employee that he no longer had any rights under his policy inasmuch as it had lapsed for non-payment of premiums more than a year previously; as far as it went, a correct statement. We do not know exactly what questions were asked; and it is unclear what information, if any, was supplied to the VA employee concerning Donaldson's health prior to 1948, or that he received definite advice from the employee regarding his right to a retroactive waiver for continuous total disability (See R. 67, 68, 72). In view of the vague character of this evidence, we believe that the district court was correct in refusing to assign weight to it. At most, if accepted, it shows conclusively that Donaldson was aware after September 1948 of the possibility that he might be entitled to a waiver.

Whatever value is assigned this evidence, however, it is clear from the record and the findings below that, Donaldson knew of his condition after 1948, and thus was in a position to make "an intelligent choice of whether or not he wanted his insurance to continue." It follows that "this Court should hold against him." *Kershner, supra* at 739, 740.

II

No More Than Ten Percent of the Total Recovery Obtained by any Claimant Under a National Service Life Insurance Policy Can Be Awarded as Counsel Fees.[9]

The District Court gave judgment of the proceeds of the $10,000 NSLI policy to the appellee Marguerite May Donaldson, and awarded $1,000 attorney's fees to appellee's counsel or 10 percent of the total judgment (R. 35, 36). The judgment, however, went on to provide for an award of 50% of the proceeds or $5,000 to the intervenor, Elmira Donaldson Tucker as guardian of Donaldson's minor children. Thus, the judgment in favor of Mrs. Donaldson, and the award made to her, in reality amounted to $5000.00, and the attorney's fees allowed counsel constituted 20 percent of the award which he obtained for his client.

Section 617 of the National Service Life Insurance Act (38 U.S.C. 817) incorporates by reference the provisions of 38 U.S.C. 445, 551, which provide that a court may assess counsel fees in suits on government insurance policies, "said fees not to exceed 10 per centum *of the amount recovered* and to be paid by the Veterans' Administration out of the payments to be made under the judgment or decree * * * " (Emphasis supplied). The collection of fees in excess of this amount is made a misdemeanor punishable by fine or imprisonment (38 U.S.C. 551). This limitation uniformly has been recognized and enforced by the courts. *Bradley* v. *United States,* 143 F. 2d 573 (C.A. 10), certiorari denied, 323 U.S. 793; *United States* v. *Kaustovich,* 17 F. 2d 84 (C.A. 4); *Saunders* v. *United States,* 22 F. 2d 619 (C.A. 7); *Lane* v. *United States,* 116 F. Supp. 606 (WDSC);

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[9] This point is not reached if the Court agrees that the judgment below must be reversed, for the reasons set forth, *supra* pp. 6-18.

Cotter v. *United States*, 78 F. Supp. 495 (D. Md.). As the Supreme Court stated in construing this statute in *Hines* v. *Lowrey*, 305 U.S. 85, 90:

> The history of § 500 [§ 551] manifests beyond doubt the clear establishment of a public policy against the payment of fees for prosecution of veterans' claims in excess of those fixed by statute. Collection of a greater fee than that fixed in the statute is made a crime, and this Court has sustained a conviction under the statute. Contracts for the collection of fees in excess of valid statutory limitations and for services validly prohibited by statute cannot stand * * *

Should the Court disagree with our contention that the judgment below must be reversed, the District Courts' order should be modified to award as counsel fees the statutory maximum of 10% of the amount recovered by appellee Donaldson.

CONCLUSION

For the above reasons, we respectfully submit that the judgment below should be reversed.

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Section 602(n) of the National Service Life Insurance Act, as amended, 38 U. S. C. 802(n), provides as follows:

> Upon application by the insured and under such regulations as the Administrator may promulgate, payment of premiums on such insurance may be waived during the continuous total disability of the insured, which continues or has continued for six or more consecutive months, if such disability commenced (1) subsequent to the date of his application for insurance, (2) while the insurance was in force under premium-paying conditions, and (3) prior to the insured's sixtieth birthday: *Provided,* That upon application made within one year after August 1, 1946, the Administrator shall grant waiver of any premium becoming due not more than five years prior to August 1, 1946 which may be waived under the foregoing provisions of this subsection: *Provided further,* That the Administrator, upon any application made subsequent to one year after August 1, 1946, shall not grant waiver of any premium becoming due more than one year prior to the receipt in the Veterans' Administration of application for the same, except as hereinafter provided. Any premiums paid for months during which waiver is effective shall be refunded. The Administrator shall provide by regulations for examination or reexamination of an insured claiming benefits under this subsection, and may deny benefits for failure to cooperate. In the event that it is found that an insured is no longer totally disabled, the waiver of premiums shall cease as of the date of such finding and the policy of insurance may be continued by payment of premiums as provided in said policy: *Provided*

further, That in any case in which the Administrator finds that the insured's failure to make timely application for waiver of premiums or his failure to submit satisfactory evidence of the existence or continuance of total disability was due to circumstances beyond his control, the Administrator may grant waiver or continuance of waiver of premiums: *And provided further,* That in the event of death of the insured without filing application for waiver, the beneficiary, within one year after the death of the insured or August 1, 1946, whichever be the later, or, if the beneficiary be insane or a minor, within one year after removal of such legal disability, may file application for waiver with evidence of the insured's right to waiver under this section. Premium rates shall be calculated without charge for the cost of the waiver of premiums herein provided and no deduction from benefits otherwise payable shall be made on account thereof.

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